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Free the Presidency to Fight Terror

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A hijacked U.S. airliner sits on an airport runway in the Middle East. The terrorists who have commandeered it threaten to begin killing American passengers unless their demands are met. The White House prepares to send intelligence operatives to the scene to gather information and gets ready to dispatch a special military unit to storm the aircraft.

But the administration's first move should be to Capitol Hill, contends Sen. David Durenberger, chairman of the Senate Intelligence Committee. Under the War Powers Resolution, he argues, the president must notify Congress—the law doesn't specify who in Congress—if there is a likelihood that U.S. forces will be involved in hostilities; later, he will have to provide a report on the operation. And, even if combat forces aren't needed, the Intelligence Oversight Act requires that certain members of Congress be told in advance about the intelligence-gathering activities.

Seamier Side of Life

Sen. Durenberger acknowledges that this isn't any way to run a counterterrorism program. Still, the Minnesota Republican says he "can't conceive of a situation" in which Congress couldn't—and shouldn't—be consulted.

However, if the U.S. is to get into the counterterrorism business in a serious way, it's time to alter this thinking. Neither current law nor the penchant for congressional micromanagement is compatible with a program that often requires swift action, secrecy and occasional involvement with the seamier side of life. Nobody disputes the need for legislative oversight, but sometimes Congress must be left in the dark about certain details.

But Congress resents being uninformed. As a result, as the Reagan administration moves closer toward acting on its tough anti-terrorism rhetoric, tensions between the White House and Capitol Hill will mount on several fronts.

Presidents across the political spectrum, from Jimmy Carter to Ronald Reagan, have challenged the legality of the Vietnam-era War Powers Resolution, and asserted that the president needn't notify Congress of every covert operation—particularly if he believes that such notification might jeopardize lives. Moreover, most experts argue that the resolution was meant to deal with large-scale hostilities, not surgical anti-terrorist strikes.

"There are so many rules that the executive branch has to jump through that unless we come to some agreement, there will always be problems," says Victoria Toensing, a deputy assistant attorney general in the Justice Department's criminal division and former chief counsel of the Senate Intelligence panel. "Congress has got to make it clear that the rules don't apply to [fighting] terrorism," so that it won't send the mistaken signal that the U.S. lacks resolve, she adds.

Presidents often resist notifying Congress of pending operations. For example, Sen. Durenberger's request for advance information about possible U.S. responses to the Achille Lauro hijacking was ignored by the White House. But administration officials worry that if the disclosure issue isn't resolved, they face intense congressional criticism if an operation goes awry.

Some members of Congress, conceding that the constitutional case isn't strong, say that consultations with Capitol Hill would help the president gauge likely public reaction to his moves.

But this is a specious argument. There is no debate over international terrorism as there was, say, over Vietnam. There is a clear national consensus that this problem must be dealt with. If anything, the administration has lagged behind the public outcry for decisive action, as Americans continue to be intimidated, injured and murdered when they travel abroad.

What is at stake for Congress, then, is congressional prerogative, rather than a clear-cut constitutional issue. "The executive branch needs to appreciate that members don't like to be surprised, and don't like to look foolish. They like to have input," says a congressional intelligence committee aide.

Terrorism experts assert that such a thorough sharing with Congress would inhibit effective operations. Decision makers attribute a lot of significance to whether their actions will require War Powers disclosure, and sometimes design actions to avoid such reporting. On several occasions in recent years, U.S. aircraft on sensitive missions in the Middle East and Central America have been deployed unarmed in order to avoid War Powers reporting required of a "force equipped for combat."

Moreover, as Secretary of State George Shultz has noted, "fighting terrorism will not be a clean or pleasant contest, but we have no choice but to play it." Sometimes this involves extortion, bribery and other assorted dirty tricks as well as contacts with unsavory individuals to obtain information. For example, says Neil Livingstone, an expert on anti-terrorism efforts, Western intelligence operatives, posing as illicit-arm's dealers, have sold terrorist groups defective explosives, which, in one case, detonated in an automobile, killing several terrorists.

To many counterterrorism experts, notifying Congress, where leaks are rampant, is tantamount to public disclosure. And disclosure, they fear, may provide operational information that aids terrorist groups, or that causes political embarrassment to cooperative nations, making them less likely to work closely with the U.S. in the future.

Meanwhile, the same institutional strains between Congress and the executive branch are at work elsewhere hampering counterterrorism policy. A revised

extradition treaty between the U.S. and Britain currently is bogged down in the Senate Foreign Relations Committee. Such treaties shield political protesters from extradition, but the administration proposes to eliminate certain violent crimes typically committed by terrorists from the list of political offenses that are exempt from extradition.

Under the administration's proposal, people guilty of aircraft hijacking and sabotage, crimes against diplomats, hostage-taking, murder and kidnapping would no longer receive protection from extradition. The White House contends such exceptions to extradition have no place in treaties with stable democracies where free political expression of grievances is permitted, and it says it will propose the changes only in treaties with such nations.

The administration is pressing the issue because in four recent cases, American courts, citing the current extradition treaty, have refused British extradition requests for members of the Provisional Irish Republican Army who committed violent crimes and fled to the U.S. Congressional opponents charge that the proposed changes would trample on the civil liberties of political dissidents. They say they prefer to make such changes through legislation that would apply to all treaties, although Congress has twice rejected such efforts. But another reason for congressional resistance is the power of the Irish-American lobby, which has launched a campaign against the treaty changes.

"The notion that this raises civil liberties issues is perverse," contends Abraham Sofaer, the State Department's legal adviser. "The ultimate civil liberty is to use the political process rather than to resort to violence."

The Ultimate Irony

This domestic political squabble raises problems similar to the debate over congressional oversight of counterterrorism operations. Mr. Sofaer worries that both create the perception abroad that the U.S. still isn't ready to relentlessly pursue the war against international terrorism. Some nations "question our ability to deliver," he says, adding that the ultimate irony would be if a Mideast terrorist who committed murder in the name of a political cause were to flee to the U.S. and be protected by current legal precedent.

To be sure, the U.S. must preserve the delicate checks and balances that protect citizens by preventing one branch of government from dominating another. But Congress can exercise proper oversight without becoming involved in the battle management of the war against terrorism. This would require trust that is itself not without risks. But there are greater threats to our freedom if we allow a small band of outlaws to force us to cower behind the cement barricades we have already begun to erect in our capital.

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